United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-1140

DOCKET NO. 77-1140

B/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

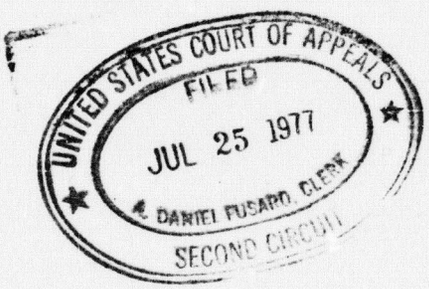
Appellee,

v.

DAVID STIRLING, JR., WILLIAM G. STIRLING, HAROLD M. YANOWITCH, EDWIN SCHULZ and RUBEL L. PHILLIPS,

Defendants-Appellants.

REPLY BRIEF FOR APPELLANT RUBEL PHILLIPS



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In his initial brief on this appeal, Rubel L. Phillips argued that it was error to deny his motion for a severance under Rule 14, Fed. R. Crim. P. He noted that before trial, when counsel disclosed that Mr. Phillips intended to move for a severance, the Government represented expressly on the record that it would introduce evidence connecting Mr. Phillips to the transactions charged in the indictment other than the Greater Gulf transaction. On the basis of that representation, and with the trial court's concurrence, such a motion was not made before trial. Instead, the motion was made at the close of the Government's case, when that representation was not fulfilled, after approximately three weeks of trial, and was summarily denied.

In addition, it was pointed out that although the indictment alleges one conspiracy, it deals with a disparate group of transactions and practices, including three land sales, the method of accounting for sales of Stirling Homex modules, and the relations between Stirling Homex and its unions, in which transactions and practices Mr. Phillips was not alleged to have been involved, and the Greater Gulf transaction in which he was alleged to have been involved. Finally, it was argued that the failure to grant Mr. Phillips a severance, which resulted in large measure from the Government's pre-trial misrepresentation as to what the evidence would show, seriously prejudiced Mr. Phillips because his innocence or guilt turned to a substantial degree on the state of mind with which he acted, and was evaluated at a joint trial against the background of

other acts by other defendants, having no relationship to Mr. Phillips.

The Government has replied with three arguments, two of which are beside the point and one of which is simply wrong: (i) The Government taxes Mr. Phillips with failing to move for a severance before trial, urging that Mr. Phillips "now states that this was done on the Government's representation that the proof against him would go beyond his involvement in the Greater Gulf transaction" (Government Brief, p.98 fn.), and chides him for the "serious omission" (Ibid.) from his argument of Judge Frankel's exclusion of evidence relating to acts that were not charged in the indictment. (ii) The Government urges that the conspiracy charged and proved was a single conspiracy because all of the transactions and practices that comprised it had a single goal: to mislead investors in Stirling Homex securities. (iii) Finally, the Government retreats to the familiar claim that even if there were multiple conspiracies charged and proved, Mr. Phillips was not prejudiced.

The Government's first contention is based on an overly agile reading of the record and of Mr. Phillips' initial brief. The Government did not induce Mr. Phillips' pre-trial decision, made with the trial court's concurrence, to forego a severance motion, by representing that it would introduce evidence of acts not charged in the indictment. Rather, the Government represented that it would introduce

evidence that would show that Mr. Phillips knew of the other transactions and practices charged in the indictment, and that that showing and conclusion would be "by explicit evidence or by a process of inference." (11/8/76 Tr. 18-22) No such evidence was introduced, nor does the Government brief suggest the "process of inference" whereby such a conclusion would be reached. Instead, the Government notes that the trial court excluded evidence of alleged payments to public officials. But that evidence was excluded on the ground that it bore no possible relation to matters charged in the indictment. (Tr. 1782-1786) Significantly, the Government omits any representation that this excluded evidence could have shown Mr. Phillips' knowledge of the other transactions and practices that were charged in the indictment; the Government offered no such representation at trial. Neither, of course, is any explanation offered of how such evidence could produce such a conclusion. This omission is fatal to the Government's argument,but is hardly surprising because there was no connection between the excluded evidence and any matters charged in the indictment. Indeed, that was precisely why the trial court excluded it.

The Government's second argument--that there was a single conspiracy charged in the indictment and proved at trial--is equally unpersuasive. As Mr. Phillips pointed out in his initial brief, it is no more telling to argue that acts by various people make up a single conspiracy, because

they result in misleading statements on different subjects in the same annual report or prospectus, than it is to argue that acts by various persons make up a single conspiracy because they all result in narcotics sales. See, e.g., United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975). Thus, there is no validity to the Government's insistence that a single conspiracy is defined by a "unifying theme" of "fradulent [sic] inflating of Homex's earnings and the failure to disclose information adverse to Homex." (Government Brief, p.99).

Nor is it correct, as the Government claims, that a single conspiracy can be inferred in this case from "consistency of personnel, method and type of operation" of the various transactions set forth in the indictment, citing United States v. Hinton, 543 F.2d 1002, 1014 (2d Cir. 1976). Instead, the personnel, method and type of operation were inconsistent. Thus, the three land sales involved side promises and guarantees by the Homex executives against loss by the purchasers and did not include participation by Mr. Phillips; the labor union transactions, consummated before Mr. Phillips' relationship with the company, involved stock received by union officials and did not include participation either by Mr. Schulz or by Mr. Phillips; and the Greater Gulf transaction, in which Mr. Phillips was alleged to have participated, involved use of an apparently forged letter of commitment from a federal agency to mislead the company's auditors and thus its stockholders. Such varied activities might possibly be part of a single

conspiracy; they might just as possibly be part of different conspiracies. Certainly there is not the "consistency of personnel, method and type of operation" that would lead to the conclusion that there was one conspiracy and the Government has not attempted to outline any such consistency.

Finally, the Government asserts that even if there was more than one conspiracy proved at trial, Mr. Phillips can show no prejudice from the failure to grant him a severance. This argument has no support save the Government's ipse dixit. Mr. Phillips' innocence or guilt, as has been argued, turned to a substantial degree on the state of mind with which he acted, and particularly whether he had reason to believe that the Greater Gulf transaction was fraudulent. His testimony and that of a confessed perjurer, W.T. Richardson, were in direct conflict. When evidence was admitted showing that another defendant, Harold Yanowitch, with whom Mr. Phillips dealt, knew the transaction was fraudulent (Tr. 2306), and that others knew so as well, there was a great temptation for the jury to infer that anyone connected with the transaction had similar knowledge.

This Court held in United States v. Variano, 550 F.2d 1330, 1334 (2d Cir. 1977) that when a conspiracy count that provides the only proper basis for joining defendants is dismissed, reversal is required only if there is a showing of prejudice or bad faith. In this case, as to Mr. Phillips, there is both. The prejudice to his defense from joinder with the other defendants has been amply stated in Mr. Phillips'

initial brief (Phillips Brief, pp. 11-13) and need not be reiterated here. But further, it is plain that when the Government represented to the trial court that the evidence would be such as to connect him with the transactions in the indictment other than the Greater Gulf transaction "by explicit evidence or by a process of inference", there was no basis whatever for that representation. For the Government to have taken such a position with no basis in fact, and thereby to have relegated Mr. Phillips to making a severance motion after the trial court had invested three weeks of its time in the case, fits within the bad faith rubric of United States v. Variano, supra. Cf. United States v. Ong, 541 F.2d 331, 338 (2d Cir. 1966) ("frivolous" legal theory by the Government would be sufficient to establish bad faith).

For the above reasons, and for the reasons set forth in Mr. Phillips' initial brief to which the Court is respectfully referred, Mr. Phillips' conviction should be reversed and a new trial ordered.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JANET A. MULDOON, being duly sworn, deposes and says:

1. I am over 18 years of age, not a party to this action and reside at 43-31 45th Street, Sunnyside, New York, 11104.

2. On the 8th day of July, 1977 I served annexed REPLY BRIEF upon the following:

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Janet A. Muldoon

Sworn to before me this
8th day of July, 1977.

Sheila J. Kahn
Notary Public

SHEILA J. KAHN
NOTARY PUBLIC, State of New York
No. 31-4513007
Qualified in New York County
Commission Expires March 30, 1978